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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNIMAX EXPRESS, INC., and on)	Case No. CV 11-02955 DDP (PLAx)
behalf of all others)	
similarly situated,)	
)	ORDER DENYING DEFENDANTS' MOTION
Plaintiff,)	TO COMPEL ARBITRATION
)	
v.)	
)	
APL, LTD., ,)	[Dkt. No. 25]
)	
Defendant.)	
)	
_____)	

Presently before the court is a Motion to Compel Arbitration filed by Defendant APL, Ltd. The Motion is substantially similar to a motion filed by the defendant in a related case involving the same plaintiff, Unimax Express, Inc. v. Cosco North America, Inc., No. CV 11-2947 DDP. This court denied the motion to compel arbitration in the related case. (See No. CV 11-2947, Dkt. No. 22.) Having considered the submissions of the parties in this case, the court denies the instant Motion on the grounds discussed in Unimax v. Cosco and reiterated below, and adopts the following order.

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1 **I. Background**

2 APL transports cargo containers over sea and land. APL
3 contracts with trucking companies such as Plaintiff Unimax Express,
4 Inc. ("Unimax") for the overland portions of APL's shipments. When
5 truckers do not pick up loaded containers within the agreed upon
6 time, equipment providers such as APL charge truckers "demurrage,"
7 or late pick-up, fees. Similarly, when trucking companies do not
8 return empty containers on time, APL charges "per diem," or late
9 drop-off, fees.

10 APL only contracts with carriers who are signatories to a
11 standard contract, the Uniform Intermodal Interchange and
12 Facilities Access Agreement ("the Agreement"). The Agreement was
13 drafted by the Intermodal Association of North America ("the
14 Association"), a trade organization located in Maryland.¹ Unimax
15 has signed the Agreement.

16 The Agreement contains an arbitration provision ("the
17 Provision"). The Provision sets forth default procedures for
18 resolving disputes "with respect to per diem [i.e. late drop-off]
19 or maintenance and repair invoices." (Agreement § H.1). Invoiced
20 parties must provide written notification of disputed charges
21 within thirty days of receipt of the disputed invoice. (Agreement
22 §§ H.2-H.3.) If an invoiced party fails to timely provide written
23 notice of a dispute, that party may not seek arbitration or assert
24 any other defense against the invoice, and must pay the invoiced
25 charges immediately. (Agreement § H.3.)

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28 ¹ The Association is not a party to this action.

1 If arbitration is sought, the Association will appoint a
2 three-member panel to resolve the dispute. (Agreement ¶ 3.)
3 "Disputes must be confined to charges arising from Maintenance and
4 Repair . . . or Per Diem [late drop-off] invoices." (Agreement,
5 Ex. D ¶ 6.) Once an arbitration is initiated, the moving party has
6 fifteen days to submit written arguments to the Association. (Id.
7 ¶ 7.) The non-moving party then has fifteen days to submit
8 responses. (Id. ¶ 8.) The arbitration panel will then render a
9 decision based on the written submissions of the parties. (Id. ¶
10 9.) If further information is required, the panel "may" hold a
11 conference call with both parties. (Id. ¶ 10.) The panel's
12 decisions are final, and are not subject to appeal. (Id. ¶ 11.)

13 On April 7, 2011, Unimax filed the instant action against APL,
14 alleging that APL unlawfully levies late pick-up and late drop-off
15 fees on weekends and holidays in violation of California Business
16 and Professions Code § 22928. APL now moves to compel Unimax to
17 arbitrate its claims under the Agreement.

18 **II. Legal Standard**

19 Under the FAA, 9 U.S.C. § 1 et seq., a written agreement that
20 controversies between the parties shall be settled by arbitration
21 is "valid, irrevocable, and enforceable, save upon such grounds as
22 exist at law or in equity for the revocation of any contract." 9
23 U.S.C. § 2. A party aggrieved by the refusal of another to
24 arbitrate under a written arbitration agreement may petition the
25 court for an order directing that arbitration proceed as provided
26 for in the agreement. 9 U.S.C. § 4; see e.g., Stirlen v.
27 Supercuts, Inc., 51 Cal. App. 4th 1519, 1526-27 (1997) (considering
28 a motion to compel arbitration). In considering a motion to compel

1 arbitration, the court must determine whether there is a duty to
2 arbitrate the controversy, and "this determination necessarily
3 requires the court to examine and, to a limited extent, construe
4 the underlying agreement." Stirlen, 51 Cal. App. 4th at 1527
5 (internal citation omitted). The determination of the validity of
6 an arbitration clause, which may be made only "upon such grounds as
7 exist for the revocation of any contract," is solely a judicial
8 function. Id. (internal citation omitted).

9 If the court is satisfied that the making of the arbitration
10 agreement or the failure to comply with the agreement is not at
11 issue, the court shall order the parties to proceed to arbitration
12 in accordance with the terms of the agreement. 9 U.S.C. § 3. The
13 FAA reflects a "liberal federal policy favoring arbitration
14 agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20,
15 25 (1991) (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr.
16 Corp., 460 U.S. 1, 24 (1983)).

17 **III. Discussion**

18 **A. Viability of Unconscionability Defense**

19 Elite opposes Mol's instant motion on the grounds that the
20 Provision is unconscionable and, therefore, unenforceable. As an
21 initial matter, the court rejects Mol's suggestion that this
22 argument is controlled by the Supreme Court's decision in AT&T
23 Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011). Concepcion
24 limited state-law-based unconscionability challenges to class-
25 action waiver provisions in arbitration agreements. Concepcion,
26 131 S.Ct. at 1753. The Court recognized, however, that "agreements
27 to arbitrate may be invalidated by generally applicable contract
28 defenses, such as fraud, duress, or unconscionability." Id. at

1 1746; See also Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947, 963
 2 (9th Cir.2012) ("Concepcion did not overthrow the common law
 3 contract defense of unconscionability whenever an arbitration
 4 clause is involved. Rather, the Court affirmed that the [FAA's]
 5 savings clause preserves generally applicable contract defenses
 6 such as unconscionability"); Community State Bank v.
 7 Strong, 651 F.3d 1241, 1267 n.28 (11th Cir. 2011) ("The ability of
 8 such contractual defects to invalidate arbitration agreements is
 9 not affected by the Supreme Court's decision in [Concepcion]. . .
 10 .").

11 B. Choice of Law

12 Before determining whether the Provision is valid, this court
 13 must first determine, under the choice-of-law rules of the forum
 14 state, which state's laws apply. Pokorny v. Quixtar, 601 F.3d 987,
 15 994 (9th Cir. 2010). Here, the Agreement contains a Maryland
 16 choice of law provision. (Agreement § G.7.) In California, courts
 17 generally respect choice-of-law provisions within contracts that
 18 have been negotiated at arm's length. Nedlloyd Lines B.V. v.
 19 Superior Court, 3 Cal.4th 459, 464 (1992).² Choice-of-law
 20 provisions will not be enforced, however, if "the chosen state has
 21 no substantial relationship to the parties or the transaction and
 22 there is no reasonable basis for the parties choice" or 2) the
 23 chosen state's law is contrary to the fundamental public policy of

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 25 ² The court notes that here, as discussed further infra, the
 26 Agreement was not negotiated at arm's length. The Association
 27 drafted the standard language of the Agreement, to which Unimax had
 28 to agree in order to conduct business with APL. "[C]ourts should
 not apply choice-of-law provisions in adhesion contracts if to do
 so would result in substantial injustice to the adherent." Flores
v. American Seafoods Co., 335 F.3d 904, 918 (9th Cir. 2003)
 (internal quotation marks omitted).

1 a state that has a materially greater interest in the issue at hand
2 and whose law would otherwise apply. Bridge Fund Capital Corp. v.
3 Fastbucks Franchise Corp., 622 F.3d 996, 1002-1003 (9th Cir. 2010);
4 Nedlloyd, 3 Cal.4th at 465.

5 Here, Maryland has no relationship to the parties or the
6 transactions at issue here. No party is located in Maryland, nor
7 does it appear that any party conducts substantial business in
8 Maryland. Unimax asserts, and APL does not dispute, that all of
9 the transactions relevant here occurred in California. Unimax's
10 claims arise under California state law alone. This case's only
11 tie to Maryland is the fact that the Association, which drafted the
12 Agreement, is located in Maryland. The Association, however, is
13 not a party to this case. The court cannot find any reasonable
14 basis to apply Maryland law where the only conceivable connection
15 to Maryland is a contract of adhesion drafted by a third party.
16 Accordingly, California law applies.

17 C. Validity of the Arbitration Provision

18 Unconscionability has generally been recognized to include (1)
19 an absence of meaningful choice on the part of one of the parties
20 and (2) contract terms which are unreasonably favorable to the
21 other party. Stirlen, 51 Cal. App. 4th at 1531. Put another way,
22 unconscionability has a "procedural" and "substantive" element.
23 See Davis v. O'Melveny & Myers, 485 F.3d 1066, 1072 (9th Cir.
24 2007). "[A]n arbitration agreement, like any other contractual
25 clause, is unenforceable if it is both procedurally and
26 substantively unconscionable." Pokorny, 601 F.3d at 996.

27 California courts apply a "sliding scale" analysis in making
28 this determination. "[T]he more substantively oppressive the

1 contract term, the less evidence of procedural unconscionability is
2 required to come to the conclusion that the term is unenforceable,
3 and vice versa." Armendariz v. Found. Health Psychcare Servs.,
4 Inc., 24 Cal.4th 83, 114 (2000). Both procedural and substantive
5 unconscionability must be present for a contract to be declared
6 unenforceable, but they need not be present to the same degree.
7 Id.; See also Harper v. Ultimo, 113 Cal. App. 4th 1402, 1406
8 (2003).

9 1. Procedural Unconscionability

10 APL's contention that the Agreement is not adhesive is not
11 persuasive. APL appears to argue that Unimax had some voice in
12 the drafting of the Agreement, presumably because motor carriers
13 were represented on the Association's Executive Committee. (Mot.
14 at 13.) There is no evidence, however, that Unimax took part in
15 any negotiations. Indeed, Unimax insists that it did not. (Opp.
16 at 9.) APL further asserts that the Agreement was not adhesive
17 because Unimax had already signed on to the Agreement prior to the
18 adoption of the Arbitration Provision. (Mot. at 14.) APL does
19 not, however, dispute Unimax's assertion that Unimax had to join
20 the standardized Agreement, including the Provision, in order to
21 conduct business as an intermodal carrier after the adoption of the
22 Provision in 2008.

23 It is well settled that standardized, adhesive contracts
24 drafted by the stronger party are procedurally unconscionable.
25 Pokorny, 601 F.3d at 996. The fact that the Association, and not
26 APL, drafted the Provision's language, does not affect the strength
27 of the parties' relative positions. Though APL did not itself
28 draft the Agreement, it clearly approved of the Provision's

1 language, and proceeded to present the Provision to Unimax on a
2 take it or leave it basis. Unimax could not operate as an
3 intermodal carrier unless it agreed to the Provision. As such, the
4 Provision is procedurally unconscionable. See, e.g. Bridge Fund,
5 622 F.3d at 1004 ("California law treats . . . terms over which a
6 party of lesser bargaining power had no opportunity to negotiate[]
7 as procedurally unconscionable to some degree.") (citing
8 Armendariz, 24 Cal.4th at 114); Pokorny, 601 F.3d at 996 ("An
9 agreement or any portion thereof is procedurally unconscionable if
10 'the weaker party is presented the clause and told to "take it or
11 leave it" without the opportunity for meaningful negotiation.'")
12 (quoting Szetela v. Discover Bank, 97 Cal.App.4th 1094 (2002)).

13 2. Substantive Unconscionability

14 Substantive unconscionability focuses on the one-sidedness of
15 the contract terms. Armendariz, 24 Cal.4th at 114. "Where an
16 arbitration agreement is concerned, the agreement is unconscionable
17 unless the arbitration remedy contains a 'modicum of
18 bilaterality.'" Ting, 319 F.3d at 1149 (citing Armendariz, 319
19 F.3d at 117).

20 Here, the burdens of the arbitration procedures fall
21 inordinately on the invoiced party. If Unimax believes it has been
22 improperly charged, it must provide written notice of the dispute
23 to APL within thirty days, at pain of forfeiting any defense to
24 such charges, regardless of whether the charges are proper. This
25 thirty-day notice period operates as a statute of limitations
26 shorter than the four-year claim period available under California
27 law, and works solely to APL's benefit. See California Business
28 and Professions Code § 17208.

1 Other terms of the Provision also operate solely to APL's
2 benefit. While both parties could theoretically initiate an
3 arbitration, the burden is always on the invoiced party to initiate
4 a dispute. (Agreement § H.1.) Though an invoiced party may
5 receive any number of invoices in a given thirty-day period, it may
6 not dispute more than five invoices in a single arbitration.
7 (Agreement Ex. D ¶ 6.) When an invoiced party believes it has been
8 wrongly charged and proceeds to arbitrate five or fewer charges, it
9 must submit all of its arguments to the arbitration panel first.
10 The invoiced party must articulate its arguments with a clarity
11 bordering on prescience, for it has no right to discovery and will
12 have no opportunity to rebut the invoicing party's response
13 (notwithstanding the possibility that the arbitration panel "may"
14 initiate a conference call).

15 Finally, even if the invoiced party receives a favorable
16 determination, the arbitration panel lacks the power to enjoin the
17 invoicer's wrongful conduct, leaving the invoicer free to repeat
18 the offense. In the case of an ongoing violation, the invoiced
19 party's only option is to initiate a separate dispute every thirty
20 days, ad infinitum. Under these circumstances, the arbitration
21 procedures lack even a modicum of bilaterality, and the Provision
22 is, therefore, substantively unconscionable.

23 **IV. Conclusion**

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1 For the reasons stated above, Defendants' Motion to Compel
2 Arbitration is DENIED.³ Any class certification motion shall be
3 filed within ninety days of the date of this order.

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5 IT IS SO ORDERED.

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8 Dated: June 21, 2012


DEAN D. PREGERSON
United States District Judge

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³ The court acknowledges that the Los Angeles County Superior Court disagreed with this court's reasoning regarding the viability of the unconscionability defense and compelled arbitration in Elite Logistics Corp v. Wan Hai Lines, et al., Case No. BC 459050 and Unimax Express v. Hyundai Merchant Marine, Case No. BC 459051.